Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of		
Review of the Commission's Regulations Governing Television Broadcasting		**MM Docket No. 91-221**

REPLY COMMENTS

OF

LSOC

THE LOCAL STATION OWNERSHIP COALITION

March 21, 1997

THE LOCAL STATION OWNERSHIP COALITION

<u>AK Media Group, Inc.</u>

<u>Argyle Television, Inc.</u>

<u>Allbritton Communications Company</u>

<u>The Association of Local Television Stations, Inc.</u>

<u>Blade Communications, Inc.</u>

<u>Clear Channel Television Licenses, Inc.</u>

<u>Gray Communications Systems, Inc.</u>

<u>Hearst Broadcasting</u>

<u>LIN Television Corporation</u>

<u>Malrite Communications Group, Inc.</u>

<u>Max Media L.L.C.</u>

<u>Pappas Telecasting Companies</u>

<u>Paxson Communications Corp.</u>

<u>Sinclair Broadcast Group, Inc.</u>

<u>Sullivan Broadcasting</u>

<u>Tribune Broadcasting Company</u>

<u>Waterman Broadcasting Corp.</u>

Executive Summary

The central feature of the comments filed in response to the Commission's *Second Further Notice* and, indeed, the entire record in this proceeding is the widespread and overwhelming support for substantial relaxation of the duopoly rule. Furthermore, the record substantiates claims that relaxation of the rule would serve the public interest. A compelling example of the evidence demonstrating the public interest benefits of relaxing the rule comes from the LMA "lab." In many, many instances, LMAs involving stations in the same market have engendered significant improvements in the quality and responsiveness of local broadcast television service. The most recent compilation of such evidence, *Local Marketing Agreements and the Public Interest,* is being filed contemporaneously by ALTV. This study describes the beneficial effects of LMAs in numerous markets. It re-confirms what is already obvious -- the concrete benefits of relaxing the duopoly rule exceed the purely speculative and totally unfounded risks to competition and diversity in local television markets.

The few parties which oppose significant relaxation of the duopoly rule fail to provide probative evidence that local duopolies would result in unacceptable public interest costs. These proponents of the *status quo* have failed to establish that local duopolies would result in concentrated markets, much less that commonly-owned stations in such markets could exercise undue market power. Moreover, the record evidence confirms that the potential for the exercise of undue market power in any of the three relevant markets by a UHF-UHF or UHF-VHF combination in a local market is nil.

Nothing could be more unrealistic than the position that the scope of the Commission's diversity (or competition) analysis be limited to full service broadcast television stations. Consumers are bombarded incessantly by media of all sorts from a variety of different owners (voices), ranging from billboards, magazines, newspapers, radio, cable television and cable networks, DBS (and cable networks), and other emerging media (*e.g.*, OVS, the Internet). No sound basis exists for excluding these media in a *diversity* analysis.

Another fundamental reality which some parties would have the Commission ignore is the UHF handicap. The UHF handicap persists regardless of must carry and new networks. This is a result of the technical inferiority of UHF stations, particularly with respect to coverage area. Furthermore, the suggestion that the transition to digital television (DTV) will eliminate the differences between UHF and VHF propagation is wishful thinking. Even in all-UHF markets, the local UHF stations suffer the competitive disadvantage of smaller coverage areas in their competition with multichannel video providers.

MAP's proposal that the Commission require broadcasters gaining waivers of the duopoly rule "to make specific, enforceable promises as to the public interest program benefits that will redound from such a grant" is unnecessary, impractical, and repugnant to the system of broadcast regulation contemplated by the Communications Act and the First Amendment. First, stations typically seek duopoly waivers so they can improve service to the public. Therefore, no need exists to enslave this natural process to a new and intrusive regime of program content regulation. Second, in the dynamic competitive environment of today's video marketplace, no station should be compelled to commit to broadcast of particular programs for extended periods of time. Finally, this subtle, but highly effective form of censorship is inimical to the current system of broadcast regulation which eschews censorship and governmental supervision of broadcast station programming decisions.

MAP's proposal that the Commission grant waivers for failed stations only in "the most extreme of circumstances" is falsely premised. MAP contends that a failing station criterion would provide owners of profitable stations an incentive to fail, but licensees do not enter the broadcast television business to fail and sell out. MAP's proposal also would foist on the public several years of decline (at least) and a year of no service before a local station could be rescued via a duopoly waiver. MAP's view that failing or distressed stations might present bargains which should be reserved for minority, female, and independently-owned voices also is naive. If, as MAP contends, they traditionally lack access to capital, would not a proposal to buy a *failing* station involve more risk and, therefore, be less attractive to a potential investor or lender?

MAP's opposition to duopoly waivers for vacant channels also rests on shaky premises. Such a facility may be economically viable only if jointly operated with another local station. MAP also fails to appreciate the common sense rationale for sidestepping the competing application process in the case of such waivers. The prospect of competing applications would serve as an enormous disincentive to pursue operation of the facility by another local licensee.

Several parties have provided compelling examples of how permitting common ownership of two stations in the same DMA, provided their Grade A contours did not overlap, would serve the public interest. These examples bolster LSOC's proposal that common ownership of such stations be permitted even if the Commission declines to relax the rule as suggested by LSOC.

Some parties suggest arbitrary time limits on grandfathered LMAs and duopoly waivers on the apparent theory that LMAs and waivers are inherently undesirable. However, as ALTV's *Local Marketing Agreements and the Public Interest* and the record as a whole reveal, LMAs (and duopolies) are benevolent creatures of a marketplace characterized by more competition and diversity than the Commission might ever have hoped to preserve when it adopted the duopoly rule over 30 years ago. This is precisely why Congress directed the FCC to grandfather existing LMAs!

Thus, the record before it fails to provide any support for maintaining the current prohibition on common ownership of two stations in the same market. LSOC, therefore, reiterates its call for prompt and substantial relaxation of the rule.

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This proceeding presents the Commission with the opportunity to build a bridge to the next century. Several commenting parties, however, would prefer that the Commission fix its vision on the world as it existed thirty years ago and perpetuate the anachronism represented by the current duopoly rules. They continue to cast a blind eye towards revolutionary changes in the video marketplace and pretend that broadcast television enjoys a strangle hold on the video marketplace. Consequently, they make arguments which ignore the context of today's highly competitive and diverse video marketplace. They fret that a broadcast

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[1]The following reply comments are submitted by the Local Station Ownership Coalition ("LSOC"), in response to the Commission's *Second Further Notice of Proposed Rule Making,* MM Docket Nos. 91-221 & 87-8, FCC 96-438 (released November 7, 1996) [hereinafter cited as *Second Further Notice*] in the above-captioned proceeding. LSOC is an informal coalition of local television broadcast station licensees and associations, formed to seek meaningful relaxation of the Commission's duopoly rule. The members of LSOC are listed, *supra*, at i. Some members of LSOC also are filing their own reply comments in this proceeding.

licensee with two channels in the same market somehow would be able to exercise market power in a community served by a cable system offering 50-100 channels and at least four competitive DBS systems offering similarly expansive arrays of video programming.[2] They decry a putative decline in diversity from the combination of two local television stations in a market served by numerous media voices. They denounce LMAs, while neglecting to mention the demonstrable contribution of LMAs to increases and improvements in local broadcast television service -- including news, public affairs and other "public interest" programming.

Their sojourn in a theme park "Yesterland" may be the stuff of nostalgia, but it hardly marks the path towards a sound decision in this proceeding. The bridge to the next century may be reached only via the up ramp of reality and reason. The Commission embarked on this path when it repealed the network financial interest and syndication rules and the prime time access rule. It recognized the vastly more

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[2]Fears have been voiced that the advent of digital television transmission will enhance the power of local duopolies because each station will be able to provide multiple channels of programming. Such fears are unfounded. First, the relative positions of the competitors in the local video marketplace will remain constant. Every station and already-multichannel video provider will have access to the same technology. Thus, if one station can offer four different program channels, that same capability will be available to all stations. Second, the assumption that stations actually *will provide* four channels of programming is questionable -- even doubtful. High definition television, which uses the bulk of the digital signal, will preclude transmission of multiple program channels during much of the broadcast day. Indeed, the chairman has suggested that network-owned stations in major markets launch high definition television very early in the transition to digital. Third, many stations likely will be unable to afford to program four channels. Therefore, the transition to digital television offers no sound premise for additional concern about the potential market power of local duopolies.

competitive marketplace of the 90s and rid its rule book of restrictions designed as surrogates for the competition which was only a dream when they were adopted. Now the Commission need only follow its own lead across the bridge to the 21st century in this proceeding.

To that end, LSOC has proposed a reasonable course to the Commission, one which involves substantial relaxation of the current duopoly rule, but remains mindful of the Commission's need to stand guard against genuine threats to the public interest. LSOC, thus, has urged the Commission to modify its rules as follows:

- Amend the duopoly rule to permit common ownership of two television stations in the same market, provided one of the stations is a UHF station.
- Grandfather all LMAs permanently.
- Permit renewal and transfer of all grandfathered LMAs.
- Continue to permit LMAs regardless of changes in its attribution or ownership rules.
- Amend the duopoly rule to define a station's market as its DMA and generally abandon use of predicted coverage contours.
- Amend the duopoly rule to permit ownership of two stations in the same DMA, but with no Grade A contour overlap.

LSOC's proposal in no way would leave the Commission blind or helpless in assessing local duopolies. All proposed assignments or transfers of station licenses would remain subject to Commission review and those involving new duopolies still could be found contrary to the public interest in the face of *bona fide* and compelling showings of expected harm. The burden, however, would be placed properly on those who seek to prove the exception to the general reality that common ownership is far more beneficial than costly in public interest terms.

Most commenting parties support substantial relaxation of the duopoly rule. Some, however, resist regulatory change despite the dramatic change in the video marketplace governed by the rules. LSOC, therefore, takes this opportunity to address and refute some of the more prominent arguments against relaxation of the duopoly rule.

I. Advocates of the Status Quo Have Failed to Show That Relaxation of the Duopoly Rule Would Impose Public Interest Costs Sufficient to Justify Maintaining the Current Absolute Prohibition on Common Ownership of Two Stations in the Same Market.

The few parties which oppose significant relaxation of the duopoly rule fail to provide probative evidence that local duopolies would result in unacceptable public interest costs. Implicit in their approach is an apparent belief that the burden must fall on proponents of relaxation of the rule to show that no harm would occur. This would turn the rulemaking process on its head.

Indeed, reviewing courts properly have rebuked the Commission when it has maintained or adopted rules designed to solve problems which did not or no longer exist.[3] A prominent example from earlier in this decade is the Commission's decision to maintain the network financial interest and syndication rules in the face

[3] *See, e.g., Home Box Office v. FCC,* 567 F. 2d 9, 36 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 829 (1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist' ")(citation omitted).

of substantial evidence that the relevant markets had become competitive.[4] Ultimately, in the wake of a stinging judicial rebuff, the Commission relaxed the rules and scheduled their complete expiration.[5] If the Commission in this proceeding takes the same realistic view of the marketplace that it took in its decisions to eliminate the network financial interest and syndication rules and later the prime time access rule, then only one rational course is open to the Commission -- substantial relaxation of the duopoly rule.[6]

In those proceedings, the Commission embraced the changes in the video marketplace since adoption of the rules some twenty years previously and placed a heavy burden on those who sought to maintain the restrictions embodied in the rules. The standard is straightforward. Once the relevant market has been determined,

> [W]e estimate and analyze the market's structure and its concentration, as an indication of the absence of undue market power. By market concentration, we refer to the extent to which one or more large firms may have significant shares of the relevant market. If the market is unconcentrated, we presume that the exercise of undue market power is not possible. If the market is concentrated, other market conditions,

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[4]*Report and Order*, MM Docket No. 90-162, 6 FCC Rcd 3094 (1991), *vacated sub nom. Schurz Communications v. FCC*, 982 F. 2d 1043 (7th. Cir. 1992).

[5]*Second Report and Order*, MM Docket No. 90-162, 8 FCC Rcd 8270 (1993), *aff'd sub nom. Capital Cities/ABC, Inc. v. FCC*, 29 F. 3d 309 (7th. Cir. 1994).

[6]For example, extensive analysis of the top 50 markets by the Commission has led it to conclude that even acting jointly, the three networks' affiliates could not dominate video program delivery in their markets. *Prime Time Access Rule*, 11 FCC Rcd 546, 562 [hereinafter cited as *PTAR*].

> including barriers to entry, must be examined to determine if one or more firms can exercise undue market power.[7]

Significantly, the Commission has stated that:

> Even a firm with a very large market share cannot automatically be presumed to have market power; more research would be needed regarding whether there are competitive factors such as ease of entry, excess capacity held by competitors, etc., that would defeat any attempt by the firm to exercise market power despite its very large market share.[8]

Thus, in order to conclude that local duopolies might exercise undue market power, the Commission must find a concentrated market *and* other market conditions which indicate that they could exercise market power. As defined by the Commission, undue market power is "the exercise of market power... that imposes sufficiently large costs on society to justify regulatory or antitrust action to ameliorate those costs."[9]

Yet, proponents of the *status quo* do little more than wave their arms and trumpet a litany of dire consequences, all of which are abstract and none of which draws any support from real world experience. They have failed to establish either that local duopolies would result in concentrated markets, much less that commonly-owned stations in such markets could exercise undue market power.

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[7]*PTAR*, 11 FCC Rcd at 559. This analytical approach has been widely used by the Commission and has been adopted in this proceeding as well. *Id., citing Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524, 3534 (1995)[hereinafter cited as *Further Notice*].

[8]*PTAR* , 11 FCC Rcd at 557-558, n. 44 [citations omitted].

[9]*PTAR*, 11 FCC Rcd at 557.

Even the Media Access Project *et al.* acknowledge a lack of substantive information in the record.[10]

Moreover, the record evidence in reality screams a contrary conclusion. As documented in LSOC's comments, the potential for the exercise of undue market power in any of the three relevant markets by a UHF-UHF or UHF-VHF combination in a local market is nil. Concentration rarely would be high, and the ability to exercise market power even where concentration is high is nonexistent.[11]

The record in this case is particularly telling because the existence of LMAs has provided an opportunity to assess whether at least jointly operated stations in the same market might be able to exert undue market power. That no one has come forward with evidence demonstrating the exercise of undue market power in LMA situations ought erase any doubt that the risk of relaxing the duopoly rule is far too

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[10]Comments of the Media Access Project *et al.*, MM Docket No. 91-211 (filed February 7, 1997) at 4 [hereinafter cited as "MAP"].

[11]Comments of The Local Station Ownership Coalition, MM Docket No. 91-221 (filed February 7, 1997) at 31-33, 41-45, [hereinafter cited as "LSOC(97)"]; Addanki, Beutel, and Kitt, *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule*, National Economic Research Associates (May 17, 1995) at 19 [hereinafter cited as "NERA (LSOC)"], submitted as Exhibit 1 to Comments of The Local Station Ownership Coalition, MM Docket No. 91-221 (filed May 17, 1995) [hereinafter cited as "LSOC(95)"]; *see also An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-ownership Rules*, Economists Incorporated (May 17, 1995) at 17, 32-33, 46-47, 88 [hereinafter cited as "The EI Study"].

insufficient to justify maintaining the current absolute prohibition on common ownership of two stations in the same market.[12]

With such a record, the Commission hardly may maintain the rule. With no meaningful factual predicate for a finding or even a reasonable prediction of palpable public interest harm, the Commission never could justify maintaining the current absolute prohibition on local duopolies. As the D.C. circuit has stated, "[M]ere conjecture and abstract theorizing offered in a vacuum are inadequate to satisfy us that the agency has engaged in reasoned decision making."[13] The Commission must do more than "posit the existence of the disease sought to be cured."[14] It must do what it cannot do in this proceeding, make reasonable findings of real harm based on the record evidence before it.

Therefore, the failure of proponents of maintaining the current duopoly rule to provide sufficient probative evidence that local duopolies would impose

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12Evidence from experience with LMAs shows, to the contrary, that LMAs produce substantial benefits in program diversity and quality. These benefits further tip the scale towards substantial relaxation of the rule. *See* LSOC(97) at 63-64.

13*Arizona Public Service Commission v. United States*, 742 F. 2d 644, 649, n.2 (D.C. Cir. 1984); *see also Bethlehem Steel Corp. v. U.S. Environmental Protection Agency*, 638 F. 2D 994, 1004 (7th. Cir. 1980)("The record or agency decision must demonstrate and reflect the exercise by the Administrator of 'reasoned discretion' and not simply manifest a 'crystal ball inquiry.'").

14*Quincy Cable TV. Inc. v. FCC*, 768 F. 2d 1434, 1455 (D.C. Cir. 1985).

unacceptable public interest costs (*i.e.*, costs in excess of the demonstrable benefits of local duopolies) is fatal to any decision to maintain the current rule.[15]

II. Exclusion of Media Other Than Broadcast Television from the Diversity Analysis Would Be a Textbook Illustration of Arbitrary Agency Action.

Proponents of the *status quo* either ignore or dismiss the transformation of the single medium broadcast marketplace of the 50s and 60s to the multi-media video marketplace of today. They insist that the scope of the Commission's diversity analysis be limited to full service broadcast television stations.[16] Nothing could be more unrealistic.

Assuming, as does MAP, that the critical variable in the diversity analysis is voice diversity (separately-owned media outlets), considering only local broadcast television stations as voices borders on the ludicrous.[17] Consumers are bombarded incessantly by media of all sorts from a variety of different owners (voices), ranging from billboards, magazines, newspapers, radio, cable television and cable networks, DBS (and cable networks), and other emerging media (*e.g.*, OVS, the Internet), as well as local broadcast stations (the numbers of which now more than double the

[15]It is similarly fatal to any rule or policy which generally leaves the burden of justifying a local duopoly on the licensee seeking a second station in a market.

[16]MAP at 22; Comments of Glenwood Communications Corporation, MM Docket No. 91-221 (filed February 7, 1997) at 5 [hereinafter cited as "Glenwood"].

[17]MAP at 8 *et seq.*

number of stations in 1964) and broadcast networks (now six in number with a seventh in the wings).[18] No sound basis exists for excluding these media in a *diversity* analysis. Owners of newspapers, magazines, radio stations, cable and broadcast networks, and DBS systems, have a definite *voice* in the community.

MAP's arguments for discounting or denying "voice" status to particular media have no merit.[19] The Commission already considers cable television as part of its diversity analysis.[20] It also would not disregard local newspapers and radio

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[18]Whereas MAP seizes on the comments of Lowell Paxson at ALTV's recent convention, which according to MAP, suggest that Mr. Paxson's primary interest as a licensee is warehousing spectrum, Mr. Paxson, no less, has more recently stated his plans to form a seventh broadcast network around his stations. Even confining one's focus to the realm of broadcast television, a seventh network portends more diversity than ever might have been imagined. MAP at 5, *but see* "Paxson: Stations in Search of a Network," *Broadcasting & Cable* (March 10, 1997) at 10-11.

[19]MAP at 22-24.

[20]*Further Notice* at ¶71. With respect to cable television, the Commission ought look to each separately-owned program channel. LSOC(97) at 53-55. As the Supreme Court recognized in *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497, 509 (1994):

> Although cable operators may create some of their own programming, most of their programming is drawn from outside sources. These outside sources include not only local or distant broadcast stations, but also the many national and regional cable programming networks that have emerged in recent years, such as CNN, MTV, ESPN, TNT, C-Span, The Family Channel, Nickelodeon, Arts and Entertainment, Black Entertainment Television, CourtTV, The Discovery Channel, American Movie Classics, Comedy Central, The Learning Channel, and The Weather Channel. Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers. See Brenner, Cable Television and the Freedom of Expression, 1988 Duke L. J. 329, 339 ("For the most part,

stations.[21] Finally, excluding a ubiquitous service like DBS would be no less arbitrary. Not everyone watches every television station or cable network or subscribes to or reads every newspaper or magazine or listens to every radio station. Indeed, not everyone subscribes to cable television. Cable television and DBS like it, nonetheless, provide programming from multiple voices -- separately-owned program channels -- which are available to all but a handful of viewers.[22]

MAP and others which wish to confine the diversity analysis to local television broadcast stations do so because the voice, source, and programming diversity now available to consumers from nonbroadcast media robs all credibility from any claim that diversity is imperiled by common ownership of two television stations in the same market. Sound analysis, however, precludes such an arbitrary view of the world.

> cable personnel do not review any of the material provided by cable networks. . . . Cable systems have no conscious control over program services provided by others").

[21]*Further Notice* at ¶74. The Commission also, of course, counts radio as well as television licensees in determining whether to grant waivers of the one-to-a-market rule. *See* 47 CFR §73.3555, NOTE 7 (1993).

[22]A small percentage of homes is not passed by cable. Similarly, a few homes may lack a clear view of the southern horizon. By and large, however, cable and DBS services now are universally available.

III. Contentions That the UHF Handicap Has Been Eradicated or Is Irrelevant Ignore Reality.

Another fundamental reality which some parties would have the Commission ignore is the UHF handicap.[23] Kentuckiana, for example, opposes a UHF-UHF/UHF-VHF exception to the rule, but its arguments lack merit. First, Kentuckiana argues that must carry and new networks have "saved" many UHF stations that were on the verge of failing. True as that may be, it says nothing about the underlying UHF handicap, which persists regardless of must carry and new networks. The record demonstrates that UHF stations, even when affiliated with one of the three established networks, draw significantly smaller audiences than similarly situated VHF stations.[24] This is a result of the technical inferiority of UHF stations, particularly with respect to coverage area.[25] Again, Rupert Murdoch would not have spent hundreds of millions of dollars to wrest away VHF affiliates from the three established networks unless the superiority of VHF stations produced similarly superior economic performance! Kentuckiana essentially confuses the

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[23] *See, e.g.*, Comments of Viacom Inc., MM Docket No. 91-221 (filed February 7, 1997) at 8 [hereinafter cited as "Viacom"]; Comments of Kentuckiana Broadcasting, Inc., MM Docket No. 91-221 (filed February 7, 1997) at 5 [hereinafter cited as "Kentuckiana"]; Comments of ABC, Inc., MM Docket No. 91-221 (filed February 7, 1997) at 9 [hereinafter cited as "ABC"].

[24] *See, e.g.*, LSOC(97) at 72-75. This also dispels the notion that the UHF handicap disappeared for stations which gained affiliations with one of the three established networks in the wake of Fox's successful quest for VHF affiliates in major markets.

[25] As the Commission is well aware, this problem is compounded by the fact that few UHF stations can afford to operate at maximum power (5 MW).

rationale for a UHF exception with the failing station waiver criterion.[26] A UHF station will suffer from the UHF handicap whether it is failing or successful. Therefore, Kentuckiana's argument fails to address the true issue and must be rejected.

Kentuckiana and Saga also suggest that the transition to digital television (DTV) will eliminate the differences between UHF and VHF propagation.[27] This is wishful thinking. The Commission has not adopted a channel allotment table designed to equalize coverage areas; it has sought primarily to replicate existing coverage areas (whether a station's new channel is a VHF channel or UHF channel). This only serves to maintain the coverage disparity between VHF and UHF stations. Therefore, the end of the UHF handicap cannot be pegged to the transition to digital.[28]

Finally, Kentuckiana makes the superficially attractive argument that UHF stations in all-UHF markets need no special consideration. Such an argument, however, completely ignores the reality that local broadcast television stations also compete against an entrenched cable industry and an expanding array of other

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[26]Viacom also attempts to equate the two distinct considerations. Viacom at 8.

[27]Kentuckiana at 6; Comments of Saga Communications, Inc. On Second Further Notice of Proposed Rule Making, MM Docket No. 91-221 (filed February 7, 1997) at 6.

[28]Even if it could, that transition will be lengthy. Relaxation of the duopoly rule already is overdue and, moreover, must be based on today's marketplace, not on hopes and dreams of a better but distant tomorrow for UHF stations.

multichannel competitors.[29] Even in all-UHF markets, the local UHF stations suffer the competitive disadvantage of smaller coverage areas in their competition with multichannel video providers.[30]

As much as some parties might desire to wish the UHF handicap away, it remains a central reality of broadcast television and likely will remain so into the world of digital television. The UHF handicap diminishes the competitive strength of UHF stations *vis-a-vis* their VHF competitors. A rule based on its existence, therefore, is in no danger of being labelled arbitrary or capricious.

IV. Limiting Relief to Cases Where Licensees Have Made Specific Programming Promises Is Neither Necessary Nor Desirable.

MAP asserts that the Commission must require broadcasters gaining waivers of the duopoly rule "to make specific, enforceable promises as to the public interest program benefits that will redound from such a grant." Furthermore, MAP says, such programming should be over and above what the licensee already is required

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[29]*See* ABC at 8 ("That advantage would enable the beneficiaries to compete not only against a nonbroadcast video outlet....").

[30]The Commission must recall in this respect that stations' ability to secure carriage under must carry throughout their ADIs is limited by the proviso that the station provide a good quality signal to the cable system headend. 47 CFR §76.55(c)(3)(1993). Again, UHF stations' less extensive signal propagation will tend to undermine full must carry protection for UHF stations.

to provide.[31] LSOC respectfully submits that MAP's proposal is unnecessary, impractical, and repugnant to the system of broadcast regulation contemplated by the Communications Act and the First Amendment.

First, stations typically seek duopoly waivers so they can improve service to the public. Often such improvements in service include news and other community-oriented programming.[32] Contrary to MAP's views, experience with LMAs provides substantial and irrefutable evidence of this.[33] Therefore, no need exists to enslave this natural process to a new and intrusive regime of program content regulation.

Second, in the dynamic competitive environment of today's video marketplace, no station should be compelled to commit to broadcast of particular programs for extended periods of time. Moreover, under MAP's proposal, a station which did wish to revamp programming to be more responsive to local demands and interests would have to report to the Commission that they, in MAP's language,

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[31]MAP at 26.

[32]Improvements in service may be in the form of more popular and more competitive general audience programming or provision of programming responsive to an unmet demand in the market. This may not always be the programs MAP would like to see, but they will be programs selected to meet consumer demands in the particular market in question.

[33]MAP at 21, *but see* LSOC (95) at 63-64, nn. 143, 144.

have "violated" the terms of their waiver. MAP's proposal, therefore, is utterly lacking in practicality.

Finally, this subtle, but highly effective form of censorship has no place in the rules and policies of the Commission. The Commission would be in a position to insist on broadcast of certain types and amounts of programming, programming which in the government's view was "better," as a condition of a waiver. This is inimical to the current system of broadcast regulation which eschews censorship and governmental supervision of broadcast station programming decisions. As stated by the Court in *Turner v. FCC*, 129 L. Ed. 2d at 522:

> [T]he FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what they want to hear."[34]

MAP's proposal, therefore, places the Commission in the role of censor and supervisor of broadcast program content, contrary to the statutory and constitutional limits on its authority.

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[34]The Court also noted Section 326 of the Communications Act, which forbids the Commission from engaging in censorship. ***Turner v. FCC*, 129 L. Ed. 2d at 522.**

V. No Sound Reason Has Been Advanced for Limiting Relief in Cases of Failing Stations or Vacant Allotments.

MAP would have the Commission grant waivers for failed stations only in "the most extreme of circumstances."[35] Under MAP's proposal, such waivers would be available only after a station has been dark for a year.[36] No waivers would be available for stations that were in the process of "failing."[37]

MAP's approach is falsely premised. For example, MAP contends that a failing station criterion would provide owners of profitable stations an incentive to fail.[38] MAP's contention is unfounded. Licensees do not enter the broadcast television business to fail and sell out. As in any business, some new ventures succeed beyond the owner's wildest dreams, while others never get off the ground (or in the case of local stations, on the air). The latter event is not unheard of in broadcasting, but no evidence has been provided to support a finding of an incentive to fail in order to appeal to a very limited class of potential buyers (other local licensees). The more rational incentive is to maximize station value so as to command a higher price from any buyer. Successful stations are more valuable -- and worth more on the

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35MAP at 18.

36*Id.*

37*Id.*

38MAP at 18.

market -- than failing stations. No owner would have an incentive to devalue a station just so another local licensee might buy it.

MAP's proposal also would foist on the public several years of decline (at least) and a year of no service before a local station could be rescued via a duopoly waiver. This would be a gross waste of valuable spectrum and a monumental disservice to the public. Moreover, if a station is forced to go dark and surrender its license, the channel then would be open for new applicants.[39] If more than one qualified applicant sought the station, then service would be further delayed by the comparative hearing process. Given the present freeze on consideration of comparative cases involving multiple qualified applicants for commercial stations, that delay could be extensive.[40]

MAP's view that failing or distressed stations might present bargains which should be reserved for minority, female, and independently-owned voices also is naive. If, as MAP contends, they traditionally lack access to capital, would not a proposal to buy a *failing* station involve more risk and, therefore, be less attractive to a potential investor or lender?

MAP also misses the point in its failure to recognize the public interest benefits of improvements in service at stations which arguably are not failing, but

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39Under Section 312(g) of the Act, 47 U.S.C. §312(g), a station's license expires twelve months after it goes dark.

40*See FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994).

are operating on the proverbial shoestring. Such stations might be unable to compete effectively as general audience stations, unless and until they can benefit from the economies of scale inherent in combined ownership or operation with another local station. Limiting relief to failed or even failing stations would deny the public the benefits of improved service in such cases.

MAP's opposition to duopoly waivers for vacant channels also rests on shaky premises. A vacant channel by definition is a channel in which no qualified potential licensee is interested. This lack of interest usually stems from a sound financial judgment that the station would not be economically viable.[41] Such a facility, however, may be economically viable if jointly operated with another local station -- which is precisely why a vacant channel waiver criterion makes perfect sense.

MAP also fails to appreciate the common sense rationale for sidestepping the competing application process in the case of such waivers. The filing of an application for a vacant channel by a local licensee would occur in circumstances where other good faith applicants already would have had ample opportunity to file an application for the facility. However, if subject to competing applications, a local licensee's application would be a target for applications filed for purposes other than placing the station on the air. For example, another local licensee might feel

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[41] Again, capital sources hardly would leap at the inordinate risk involved in investing in or lending money to an applicant for a station on such a vacant channel.